

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

PALMER INTERNATIONAL INC.¹

Employer

and

Case 4–RC–19699

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURE IMPLEMENT
WORKERS OF AMERICA, AFL–CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (hereinafter referred to as the Act), a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has designated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
2. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

¹ The Employer's name appears as amended at the hearing.

5. The Employer manufactures specialty chemicals at plants in Skippack and Worcester, Pennsylvania. The Petitioner seeks to represent a unit of 32 to 34 production, maintenance and quality control employees at the Worcester and Skippack plants. The Employer takes the position that Skippack senior lead operators Jerry Wilson and Jeffrey Tehansky are supervisors within the meaning of Section 2(11) of the Act. The Employer's Engineering Manager and General Foreman testified that the Employer created the position of "senior lead operator" in February 1999.² For the purposes of this decision, I refer to Wilson & Tehansky as senior lead operators.

The Skippack plant consists of Building A, where all friction manufacturing occurs; Building B, where incoming raw materials and outgoing manufactured products are warehoused; Building C, where quality control and coding operations occur; and Building D, also known as the distillation facility.³ Plant Manager Steve Palmer III has overall responsibility for the two plants and General Foreman of Manufacturing John Barker and his Assistant, John Petrocelli, are in charge of production personnel at both plants. Thomas Baldwin, Joseph Geib, and Mitch Bower are the three Building A foremen. Wilson and Tehansky, lead operators Scott Williams and Jason Burke, and four field operators work in Building D.⁴ Engineering Manager David Kruzick and Engineer Andrew Maseloff comprise the engineering staff.

Building D houses a multi-stage, high-vacuum facility requiring the support of a hot oil generating plant, a steam generating plant, a chiller facility and an air compressor. When Building D is operational, employees work 12-hour shifts around the clock, seven days per week. Two operators—either a field and a lead operator or two lead operators—work on each 12-hour shift. If Wilson and Tehansky are scheduled to work on the same shift, Wilson will call in a lead operator (Williams or Burke) to ensure that there is lead operator coverage on the other shift. It is not clear who schedules Wilson, Tehansky, Williams and Burke. Building D operators who will be late to work must notify Baldwin, Geib or Bower before arriving at the plant, or Barker, after arriving at the plant. During the six months prior to the hearing, the distillation facility was operational for about one month.

By watching a computer screen, the lead operator closely monitors Building D's main controls or the 148 "different control loops." A field operator, using an extensive list, checks the distillation processes on an hourly basis, conveys this information to the lead operator and executes a variety of tasks pursuant to the lead operator's instructions. Those tasks range from changing the oil in a vacuum pump to taking out the trash. The lead operators monitor and adjust the distillation facility's automated and non-automated operations, referring to

² Wilson and Tehansky identified themselves as "lead operator" or a "leadman" rather than as senior lead operators.

³ The Worcester plant serves as the Employer's corporate and financial office and research and development center, but some production occurs there as well.

⁴ The parties agree that Williams and Burke should be included the unit.

computerized information and consulting the field operator, engineering staff member or foreman for guidance as necessary.

According to Engineering Manager Kruzick, in addition to performing all of the lead operator duties, the senior lead operators: develop training programs for lead and field operators and thereby assume “the position of responsibility as far as the operation of that facility.”⁵ Kruzick’s testimony was that the senior lead operators assist in facility maintenance work, may make “hundreds of adjustments in an evening” to Building D controls, and are held responsible by the Employer for correcting any problems that occur during the shift. Kruzick also testified that a senior lead operator’s work assignments to a field operator are “routine” unless there is a problem.⁶ Maseloff and Kruzick are on call for the senior lead operators, and receive their reports concerning abnormal problems, including “emergency stops” before, if time allows, or after the senior lead operator has intervened.

The Building A foremen are salaried. Wilson and Tehansky are hourly paid. In February 1999, after Wilson and Tehansky threatened to resign, Plant Manager Palmer and General Foreman Barker granted their requests and raised their wage rate by five percent. Palmer or Barker asked Wilson and Tehansky whether they would agree to become foremen or supervisors at this time and both refused. Wilson testified that Palmer offered him more money to continue in his same job. The Employer issued Wilson and Tehansky keys to lock Building D and protect equipment there.⁷ Burke and Williams work in areas other than Building D when the distillation facility is not in operation. They did not get the general pay raises that Williams and Tehansky received, nor were they issued building keys. Burke and Williams do, however, receive five-percent premium pay when the distillation facility is operating.

When the distillation facility is not in operation Wilson and Tehansky develop safe job and operational procedures, train new operators in group situations (after operators receive training in classes run by Kruzick and Maseloff), and help repair and adjust equipment. They also train field employees. Williams and other employees also help to write safe job procedures.

Chief Engineer Kruzick, Engineer Maseloff and Wilson and Tehansky give oral reports to Barker concerning the performance of employees, as do Burke and Williams. Barker then prepares a written evaluation, which he uses to decide which probationary employees to retain after a 90-day probationary period and which employees will receive raises. Barker could not specifically recall the nature of Wilson and Tehansky’s input concerning evaluations, but he testified that their oral reports carried “a lot of weight” and, if they “had a strong conviction” that a probationary employee did not perform well, that person would not be hired. However, Barker

⁵ Kruzick also testified that Wilson and Tehansky are “in charge” when they and an operator are alone in the plant. Wilson testified that he is “in charge” of the “machine” only. Tehansky testified that he is not in charge.

⁶ Such problems occur when the computer screen shows that product quality parameters do not meet specifications and must be adjusted by the field operator, or when the feed pump must be shut down.

⁷ Only Kruzick, Maseloff, and some maintenance employees have Building D keys.

also testified that he must “get a group together for their opinion” before making a decision whether to retain probationary employees.

A finding of supervisory status is warranted only where the individuals in question possess one or more of the indicia set forth in Section 2(11) of the Act. *Providence Hosp.*, 320 NLRB 717, 725 (1996), enfd. 121 F.3d 548, 156 LRRM 2001 (9th Cir.1997); *The Door*, 297 NLRB 601 (1990). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Juniper Indus.*, 311 NLRB 109, 110 (1993). The statutory definition specifically indicates that it applies only to individuals who exercise “independent judgment” in the performance of supervisory functions and who act in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 574, 146 LRRM 2321, 2322 (1994); *Clark Machine Corp.*, 308 NLRB 555 (1992). Paper titles or grants of authority are not determinative. *MJ Metal Products*, 325 NLRB No. 22, slip op. at 2 (Nov. 21, 1997); *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976). An individual will not be found to be a supervisor unless he or she has a “kinship to management.” *Adco Elec.*, 307 NLRB 1113 fn. 3 (1992), enfd. 6 F.3d 1110, 144 LRRM 2763 (5th Cir. 1993).

The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. *Providence Hosp.*, supra, 320 NLRB at 725. The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on an employee. *Id.*; *Juniper Indus.*, supra, 311 NLRB at 110. The legislative history of Section 2(11) makes it clear that Congress intended to distinguish between employees performing minor supervisory duties and supervisors vested with genuine management prerogatives, and did not intend to remove individuals in the former category from the protections of the Act. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), reprinted in 1 Legis. Hist. 407, 410 (LMRA 1947). The legislative history also shows that Congress considered true supervisors to be different from lead employees or straw bosses who merely provide routine direction to other employees as a result of superior training or experience. *Id.*, reprinted at 1 Legis. Hist. at 410 (LMRA 1947). *Providence Hosp.*, supra, 320 NLRB at 725; *Ten Broeck Commons*, 320 NLRB 806, 809 (1996). Further, supervisory direction of other employees must be distinguished from direction incidental to an individual’s technical training and expertise. *Chevron Shipping*, 317 NLRB 379, 382 (1995).

The burden of establishing supervisory status is on the party asserting that such status exists. *Bennett Indus.*, 313 NLRB 1363 (1994). See also *St. Francis Medical Center–West*, 323 NLRB 1046, 1047 (1997); *Northcrest Nursing Home*, 313 NLRB 491, 496 fn.26 (1993). The Board has cautioned that the supervisory exemption should not be construed too broadly because the inevitable result of such a construction would be to remove individuals from the protections of the Act. *Providence Hosp.*, supra, 320 NLRB at 725; *Northcrest Nursing Home*, supra, 313 NLRB 491. Where the evidence is in conflict, or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

I find that the Employer has not carried its burden of establishing that Wilson and Tehansky are supervisors within the meaning of Section 2(11) of the Act. They do not hire, transfer, suspend, lay off, recall, promote, discipline, discharge, reward, or adjust the grievances of employees, nor do they effectively recommend any such action. Wilson and Tehansky direct and assign work to employees. However, the Employer acknowledges in its post-hearing brief, (and the record shows) that the duties of the Senior Lead Operators and Lead Operators are identical.⁸ The parties agreed that the lead operators Burke and Williams, should be included in the unit sought by the Petitioner. Duties that are performed by both non-supervisory employees and alleged statutory supervisors necessarily are not those requiring the type of independent judgment contemplated by Section 2(11) of the Act. *Clark Machine Corp.*, 308 NLRB 555, 556 (1992).

Even if the operational duties of Wilson and Tehansky were found to differ from those of Burke and Williams, those duties would not establish that Wilson and Tehansky are statutory supervisors. Section 2(11) authority is not established when an employee directs another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position, such as the direction given by a lead or journey level employee to another or apprentice employee. *Providence Hosp.*, supra, 320 NLRB at 729. See also *Cooper/T. Smith, Inc. v. NLRB*, No. 97-7024, 1999 WL 386322 (11th Cir., Jun 14, 1999), enf. 325 NLRB No. 28 (Dec. 19, 1997). That Wilson and Tehansky use their superior technical knowledge and experience in their work to direct other operators merely shows that they are highly trained lead employees who work with complex machinery. See *Chevron Shipping*, supra, 317 NLRB at 381-382. Moreover, although Wilson and Tehansky are required to use their experience to resolve problems on their shifts, Maseloff and Kruzick are on-call to provide guidance, and Wilson or Tehansky must call before or after resolving an abnormal problem. See *McCullough Environmental Services*, 306 NLRB 565, 566 (1992), enf. denied, 5 F.3d 923, 144 LRRM 2626 (5th Cir. 1993).

Dale Service, 269 NLRB 924 (1984), cited by the Employer, is distinguishable for at least two reasons. First, the record does not show that Wilson and Tehansky assign operators to tasks based in part on their assessment of the operators' "abilities and the expertise required." Second, Wilson and Tehansky do not assign overtime work, send employees home, or call both operators and maintenance employees in to work, all without the managers' prior approval. Wilson testified that if he and Tehansky are scheduled to work on the same shift, Wilson "will call someone in, another lead operator" to ensure that there is lead operator coverage on the other shift in question. The record lacks further evidence concerning Wilson's actions in this regard, and there is no evidence that he exercises independent judgment in performing this duty. Moreover, Wilson has a pool of only two lead operators to choose from (Williams and Burke) and there is no evidence that Wilson possesses the authority to require either of them to report to work. *St. Francis Medical Center-West*, supra, 323 NLRB at 1047.

⁸ Contradicting the testimony of Kruzick and Barker, Wilson and Tehansky testified that their current position is "lead operator" or "leadman," not "senior lead operator." The proper consideration is whether the functions, duties, and authority of an individual, regardless of title, meet any of the criteria for supervisory status defined in Section 2(11) of the Act." *Bowne of Houston*, 280 NLRB 1222, 1225 (1986).

With respect to Wilson and Tehansky's involvement in the performance evaluations prepared by John Barker, the record shows that other employees, including Burke and Williams, give the same sort of information to Barker. Each evaluation reflects the opinions of Chief Engineer Kruzick and Engineer Maseloff as well as those of Wilson, Tehansky and other individuals Barker chooses to consult. Barker could not recall the specific nature of Wilson's or Tehansky's contributions. In the absence of evidence demonstrating that Wilson and Tehansky's input had a positive or negative effect on any particular employee's evaluation—and in view of the large number of individuals Barker consults before completing the evaluations—the Employer has not satisfied its burden of establishing that Wilson and Tehansky's involvement in the evaluation process imbues them with supervisory authority. *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995) *Ahrens Aircraft*, 259 NLRB 839, 843 (1981), *enfd.* 703 F.2d 23, 112 LRRM 3298 (1st Cir. 1983). The Employer also relies on *Liquid Transporters*, 250 NLRB 1421, 1425 (1980). The Board there noted that the alleged supervisory shift leaders made oral and written recommendations about employees' work performance which were reviewed and given weight by the Employer. Under current Board law, that kind of participation in the evaluation process does not suffice to establish statutory supervisory status. Further, unlike the evidence in *Liquid Transporters*, the record does not show that Wilson and Tehansky use independent judgment to choose among various employees for work assignments or to call in, send home, or transfer employees. *Id.* at 1425.

Wilson and Tehansky receive a pay premium, but the record does not show that this is because they assumed new, supervisory responsibilities. Rather, the Employer gave them a five-percent wage increase to retain them after Wilson submitted a resignation notice and Tehansky requested a pay increase. Moreover, higher pay, possession of keys to Building D, leading group training sessions, and developing operational procedures are secondary indicia of supervisory status which will not support a finding of supervisory status where no evidence of primary indicia exists. *First Western Bldg. Services*, 309 NLRB 591, 603 (1992). Based on the foregoing, I find the record evidence insufficient to establish that Jerry Wilson or Jeffrey Tehansky possess the requisite indicia of supervisory status.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production, maintenance and quality control employees employed by the Employer at the Employer's Worcester and Skippack, Pennsylvania plants, excluding all managerial, professional, clerical, confidential, and casual employees, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,⁹ subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURE IMPLEMENT WORKERS OF AMERICA, AFL-CIO

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within **7** days of the date of this Decision **3** copies of an election eligibility list, containing the **full** names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be clearly legible, and computer-generated lists should be printed in at least 12-point type. In order to be timely filed, such list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **June 25, 1999**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

⁹ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, NW, Room 11613, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **July 2, 1999**.

Dated June 18, 1999

at Philadelphia, PA

/s/ Daniel E. Halevy

DANIEL E. HALEVY

Acting Regional Director, Region Four

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